

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON**

WASHINGTON CHEMICAL, INC., )  
 )  
Appellant, )  
 )  
v. )  
 )  
STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
 )  
Respondent. )  
\_\_\_\_\_ )

PCHB NOS. 92-41 & 92-126

**FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER**

This case was heard by the Pollution Control Hearings Board ("Board") on January 24 through 26 and the morning of January 27, 1994. The hearing was held in room 126 of the U. S. Post Office Building, at West 904 Riverside, in Spokane, Washington.

Louise M. Becker of Gene Barker & Associates, Inc., of Olympia, recorded the proceedings.

Washington Chemical, Inc. ("WCI") was represented by Brian Rekofke, of Witherspoon, Kelley, Davenport & Toole. The Department of Ecology ("Ecology") was represented by Assistant Attorneys General, Mary Sue Wilson and Thomas C. Morrill.

Robert V. Jensen, attorney member of the Board, presided. Richard C. Kelley and Mr. Jensen comprised the Board.

The Board heard sworn testimony, reviewed exhibits and the briefs of the parties. Based thereon, the Board renders these:

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

## FINDINGS OF FACT

### I

WCI is a treatment, storage, or disposal ("TSD") facility in Spokane. It stores and recycles dangerous wastes, under permit from Ecology. The permit is effective for ten years, beginning June 30, 1984.

### II

Historically, WCI has received spent solvents from dry-cleaning, painting, automotive repair, and other businesses. WCI distills these into recycled product, which it resells. The residue generated by WCI, known as still bottoms, is ultimately disposed of off-site.

### III

The permit authorizes WCI to store a total of 80 55 gallon drums of still bottoms, and a combined total of 360 drums of still bottoms and recoverable solvents, on parcels A and B of its facility at: East 3828 Queen Avenue in Spokane.

### IV

WCI's permit allows it to store the following dangerous wastes, according to the designated codes:

<u>Dangerous waste code</u>	<u>Dangerous waste</u>
F001	spent halogenated solvents used in degreasing, and sludges from the recovery of these solvents
F002	spent halogenated solvents and the still bottoms from the recovery of these solvents
F003	spent nonhalogenated solvents and the still bottoms from the recovery of these solvents

1  
2 F005

spent nonhalogenated solvents  
and the still bottoms from the  
recovery of these solvents

3  
4 V

5 WCI leases the property to which this permit pertains, from Charles Stuchell. Parcel  
6 B, on the west side of this property, contains a storage warehouse, with a sump, and the  
7 distilling equipment. Parcel A, which is separated from parcel B by a dirt area, is a concrete  
8 storage pad with secondary containment curbing and a sump. The property on the east, which  
9 is separated by a cyclone fence, contains a blue warehouse and the office, on the south; and  
10 the area where WCI has been more recently accumulating wastes, to the north. To the south  
11 and west of this property, lies property owned by Donn Herron, the President of WCI, upon  
12 which he has indicated some interest in expanding WCI's operation. On this property lies a  
3 red barn, which presently is used to store wastes which are not regulated by Ecology.

14 VI

15 Ecology has previously taken enforcement actions against WCI. In 1982, Ecology  
16 issued WCI a civil penalty for storing hazardous wastes without a permit. On January 18,  
17 1985, Ecology issued WCI an order requiring the construction of approved storage facilities  
18 within 60 days. This order was accompanied by a civil penalty of \$5,000, for not completing  
19 construction according to the compliance schedule in the permit. Ecology, on March 23,  
20 1985, issued to WCI, a \$15,500 civil penalty, for failure to construct the facilities pursuant to  
21 the previous order. The Board, on September 23, 1985, affirmed the January order and  
22 penalty; affirmed \$10,000 of the \$15,000 penalty, suspending the remainder, provided WCI  
23 had no further violations of the dangerous waste laws for two years after the Board's order;  
24 and temporarily affirmed Ecology's revocation of WCI's "batch tolling" exemption from the  
25

1  
2 dangerous waste regulations, while WCI complied with the secondary containment requirement  
3 of its permit.

#### 4 VII

5 Ecology, on May 27, 1988, fined WCI \$1,000 for violating the aisle maintenance  
6 provisions of its permit, within the inside storage area.

#### 7 VIII

8 On January 2, 1991, Ecology reduced a civil penalty issued to WCI, from \$138,000, to  
9 \$90,000. The Board, on July 6, 1993, affirmed that penalty; which was assessed for several  
10 violations of the dangerous waste regulations and WCI's permit, including: maintaining open  
11 drums, failing to maintain adequate aisle space, failure to label waste, mixing incompatible  
12 waste, storing wastes in a trailer, not conducting inspections for permitted storage areas,  
13 failure to follow contingency plan following a significant release of dangerous waste, not  
14 reporting any instances of noncompliance, and not completing required inspection logs.

#### 15 IX

16 Bruce Howard, Ecology inspector, in March 1989, made his first visit to WCI as lead  
17 inspector. He inspected the west, permitted parcels. That was the first time that he saw waste  
18 stored on the eastern, unpermitted parcel. Mr. Howard asked Mr. Herron about a group of  
19 about 40 drums, which were labeled as hazardous waste, flammable solids. Mr. Herron  
20 replied that they were still bottoms, and were being placed in this area prior to shipment off  
21 the site.

#### 22 X

23 Ecology, in June 1989 ordered WCI to comply with the accumulation standards of  
24 WAC 173-303-200. This regulation limits storage in any accumulation area to ninety days  
25 after their generation. This was followed by a second order in July, which required WCI to

1  
2 provide secondary containment in this accumulation area. That order required WCI to submit  
3 to Ecology, engineered plans for a covered concrete containment system for 40 drums. The  
4 plans were submitted, shortly after Ecology did a brief inspection in March of 1990. That  
5 inspection resulted from a complaint.

#### 6 XI

7 Ecology, in March 1990, observed approximately twice as many drums in this  
8 accumulation area, than it had previously seen in the March 1989 inspection. Ecology did not  
9 respond to WCI's submittal of engineered drawings for the containment area, because it was  
10 concerned that WCI might not be storing just still bottoms in that area; but that WCI might be  
11 using that area to increase its overall storage capacity.

#### 12 XII

13 It was Ecology's concerns over WCI's apparent expansion, that caused it to plan with  
14 officials from the Environmental Protection Agency ("EPA") a joint, comprehensive  
15 investigation of WCI, for July 1991.

#### 16 XIII

17 This inspection was commenced without notice to WCI. Ecology was represented by  
18 Mr. Howard and Wayne Krafft. Jack Boller represented EPA. Mr. Howard was the lead  
19 inspector. They arrived at the site at approximately 1:15 in the afternoon, on Thursday, July  
20 18, 1991. The Ecology officials were wearing photo identification badges. They presented  
21 their credentials to the facility manager, Doug Nowell.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

XIV

WCI was not totally cooperative. Mr. Nowell told the inspectors that he was instructed by Donn Herron, to tell them to wait for WCI's attorneys to be present. He explained that he would have to call Mr. Herron, who was on his way to Portland, and WCI's attorneys. Mr. Nowell left a message at the law firm, and called Mr. Herron on his car phone. After speaking briefly with Mr. Herron, the car phone went out of range.

XV

While they were waiting, Mr. Howard suggested that Ecology might review certain records. Mr. Nowell agreed and provided some training records and inspection logs. Mr. Howard, after this review was completed and they had waited several more minutes, suggested that the facility tour begin. Mr. Nowell concurred.

XVI

The inspection began in the accumulation area on the east parcel. Mr. Howard observed about 200 drums there. He inquired what types of wastes were there. Mr. Nowell responded that there was a variety of materials, including: recycled solvents, virgin product and wastes. He stated that the wastes were brought in from generators, and placed directly in this area. These wastes were removed to the west, permitted parcel, if there was room to work them. If there was not room to work on it immediately, the wastes would be relabeled with a WCI hazardous waste label, until there was room. Mr. Nowell further explained that "working" the wastes meant blending, distilling, or doing anything with the wastes on the permitted facility.

1  
2 **XVII**

3 The inspectors examined the drums, and based on representations by Mr. Nowell,  
4 concluded that 190 of them contained dangerous waste. Many of the drums were turned, such  
5 that the labels were unreadable. 64 of the drums contained the waste code D008, which  
6 signifies lead, which WCI is not permitted to manage. 14 of the drums were outside the  
7 containment curbing (which was not affixed to the ground) placed in this accumulation area.  
8 David Herron, Donn's brother, later explained that the drums were moved there so that WCI  
9 employees could move other drums over to the permitted side to be worked. David Herron  
10 affirmed Mr. Nowell's earlier statements that generators off-loaded their drums on the  
11 unpermitted side; and that the drums were worked on the permitted side when time was  
12 available.

3 **XVIII**

14 The inspectors observed a leaking drum in this area. It was labeled as non-hazardous  
15 RCRA (Resource Conservation and Recovery Act). The inspectors later sampled this drum  
16 and found that it contained hazardous waste. No notice of the spill had been given pursuant to  
17 the spill procedures of the permit, or of the dangerous waste regulations.

18 **XIX**

19 At about 2:25 p.m., Mr. Nowell received a phone call from Mr. Witherspoon, an  
20 attorney for WCI. Mr. Nowell subsequently told the inspectors to leave unless they had a  
21 search warrant. Mr. Howard replied that the inspectors would consider a denial of access a  
22 violation. When Mr. Nowell repeated that the attorney had told him to tell the inspectors to  
23 leave the premises, Mr. Howard asked if he could speak to the attorney, to clear up the issue  
24 of access. Mr. Nowell had the secretary call the attorneys and leave a message. While they  
25 were waiting for a return call, Mr. Herron called and spoke with Mr. Nowell. Mr. Howard

1  
2 asked to talk to Mr Herron Mr. Herron asked Mr. Howard to wait until he returned, or until  
3 his attorneys were present. Mr. Howard asked Mr. Herron if he was denying access. Mr.  
4 Herron replied. "No "

## 5 XX

6 The inspection then proceeded to the permitted side. The inspectors observed 125 55  
7 gallon drums on the outside storage pad, plus two 330 gallon waste containers, called "totes".  
8 Denny Englehart, the facility foreman stated, in response to Mr Howard's questions, that all  
9 of the drums were full, and that all but five drums contained hazardous waste. The five drums  
10 labeled "non-hazardous" contained wastewater from the pad's sump, according to Mr.  
11 Englehart. Mr. Howard noticed that several drums on the pad had unsecured lids; meaning  
12 that the lids were on top of the drum, but the securing bolt was either missing, or not fastened  
13 correctly. Additionally, many labels were obscured and one was unreadable. The WCI  
14 personnel agreed to correct these problems.

## 15 XXI

16 Next, the inspection continued into the storage warehouse. Mr. Howard asked Mr.  
17 Nowell how many drums there were. He responded that he would have to guess. The  
18 inspectors and WCI personnel counted 225 drums. Mr. Howard asked Mr. Englehart if the  
19 facility could keep track of its storage capacity in any way other than counting drums, he  
20 responded, "No." Most were labeled hazardous waste. Mr. Englehart stated that they were  
21 all full of hazardous waste.

## 22 XXII

23 There were drums in this area also with unsecured lids. Labels on the drums were  
24 generally obscured, on some drums there were no labels. Several drums in the warehouse  
25 were labeled as ignitable waste.



1  
2 **XXIII**

3 David Ruetz, an attorney for WCI, arrived at about 4:15 p.m. He asked the purpose of  
4 the visit. The inspectors stated their desire to do sampling the next day. It was agreed that the  
5 inspection could resume Friday, at 9:30 a.m.

6 **XXIV**

7 On Friday, the WCI attorney was joined with a legal intern, Jim Delaney, who brought  
8 a video camera. They stated that they were under instructions from attorney, Brian Rekofke to  
9 film the inspection. The inspectors left to consult their attorneys, and returned, at about 1.00  
10 p.m., upon the advice of their attorneys, with an additional inspector, Keith Stoffel, and their  
11 own video camera. When they arrived, they were met by Messrs. Nowell, Englehart,  
12 Rekofke, Ruetz and Delaney.

13 **XXV**

14 Mr. Howard asked Mr. Nowell if he was prepared to take samples from the drums.  
15 Messrs. Rekofke and Ruetz stated that Ecology should take its own samples. M. Howard  
16 inquired whether WCI had a Coliwasa sampler available. Mr. Nowell replied that the  
17 Coliwasa sampler WCI had broken about a month earlier.

18 **XXVI**

19 Wayne Krafft, of Ecology, was in charge of the sampling. He utilized a stainless steel  
20 ladle, stainless steel spoons, and an 8 millimeter glass tube. When he took the samples, he  
21 placed them in special jars with a septum at the top. He split each sample with WCI, which  
22 put its samples in Mason jars. Each sealed jar was placed in an ice chest, which contained  
23 blue ice and which was in the possession of Mr. Bolter. After the final sample was taken, Mr.  
24 Krafft took possession of the ice chest. He filled out the chain of custody form, placed it in  
25 the cooler, and sealed the cooler with a special locking seal. The chest was locked in the

1  
2 inspectors' car until the end of the site visit. At the end of the visit, Mr. Krafft took the chest  
3 to Ecology's regional office in Spokane, and put it into a refrigerator. It remained there over  
4 the weekend, until he took it out Monday morning, July 22, 1994. He broke the seal, opened  
5 the ice chest and completed the chain of custody form. He placed the form back in the chest  
6 and resealed and locked it. He then sent it to Ecology's laboratory in Manchester,  
7 Washington.

## 8 XXVII

9 Pam Covey, of Ecology's Manchester laboratory received the ice chest and its contents  
10 intact on July 23, 1991. The Manchester laboratory contracts with other laboratories to do  
11 special sampling. In this case, it contracted with Weyerhaeuser Analytical and Testing  
12 Services to do the organic sampling; and Sound Analytical Services, Inc., to do the testing of  
13 metal constituents and ignitability. The former firm received the samples from Manchester on  
14 July 26, 1991, the latter received the samples from Manchester on July 30, 1991. Mr. Krafft,  
15 who formerly worked at the Manchester laboratory, and who has a degree in chemistry and is  
16 an expert in sampling; testified that the Manchester laboratory followed its customary  
17 procedures in delivering these samples, and in receiving chain of custody documents signed by  
18 the other laboratories.

## 19 XXVIII

20 The samples and their results are as follows:

21 <u>Sample No</u>	<u>Description</u>	<u>Results</u>
22 1	liquid from sump in 23 permitted warehouse	D001 (ignitable), F002, F003, F005
24 2	drum in warehouse labeled "non-hazardous 25 waste. .dirty floor dry"	F002, F003, F005 (flashpoint 147 26 degrees)

3	drum in warehouse labeled "non-hazardous waste...waste oil-#1 still"	D001, F002, F003, F005
4	drum in warehouse labeled "hazardous waste. .waste flammable liquid...D001, F002, F003, F005	D001, F002, F003, F005,
5	liquid from sump on outside storage area	F002, F003, F005
6	drum on outside storage labeled "non-hazardous waste...sump water & sludge"	F002, F003, F005
7	drum in non-permitted storage area labeled "non-hazardous waste. . non-RCRA waste oil"	F003, F005
8	drum in non-permitted storage area labeled "non-hazardous waste ...waste flammable solid.. D008, F002, F003 F005"	D001, F003, F005

# XXIX

During the sampling, Mr. Howard asked Mr. Englehart the contents of the third sample from a drum labeled "non-hazardous waste . . . waste oil #1 still" Mr. Englehart replied, "I'll have to refer you to Donn". Mr. Englehart also refused to answer other questions about the drum. Mr. Rekofke interrupted Mr Howard's questioning and stated that he had instructed Mr. Englehart not to answer Mr Howard's questions.

1  
2 XXX

3 Because WCI staff were due to be off work that afternoon, the inspectors completed  
4 there sampling at about 3:45. Mr. Herron called. They made arrangements to return to finish  
5 reviewing records and follow up on Monday morning, July 22. Mr. Howard told Mr. Herron  
6 that he would call before coming on site.

7 XXXI

8 Mr. Krafft asked where he could wash his hands. He was directed to a washroom in  
9 the blue warehouse, to the south of the office. When he returned, Mr. Krafft commented to  
10 Mr. Howard that he had seen a large number of 55 gallon and other containers in the blue  
11 warehouse, as he left the office and went to the washroom. Mr. Howard then requested  
12 permission from Mr. Nowell, for the inspectors to check the containers stored in the  
13 warehouse. Mr. Nowell deferred to Mr. Rekofke. Mr. Rekofke opened the office door and  
14 stepped out onto a small carpet, which extended the width of the doorway, about six feet out  
15 into the warehouse. He told the inspectors that they could go no farther than the end of the  
16 carpet. Mr. Howard asked if Mr. Rekofke was denying access. Mr. Rekofke explained that  
17 he was; that WCI had been cooperative in allowing the inspectors to sample from drums in the  
18 unpermitted accumulation area; that the inspectors had no right to go into the blue warehouse;  
19 and that he lacked authority to grant the inspectors access to it. Mr. Howard stated that the  
20 inspectors had a right to inspect the facility under the permit and the regulations. Mr. Rekofke  
21 maintained his denial. Mr. Howard stated that he understood this to be a violation. He asked  
22 Mr. Ruetz and the other WCI representatives if they did not witness Mr. Rekofke deny access.  
23 They stated that they did.

1  
2 XXXII

3 The inspectors witnessed and photographed a large number of drums in storage in the  
4 blue warehouse with hazardous waste labels. Many of the drums were turned, so that the  
5 labels were not visible. The inspectors left the site at about 4.00 p.m.

6 XXXIII

7 Mr. Howard called Mr. Herron at about 8:30 a.m., Monday, stating that the inspectors  
8 would be over soon. Mr. Herron stated that he was too busy, and that the attorneys were  
9 there. He warned Mr. Howard that if they came then, they would be denied access. After a  
10 lengthy discussion, the Mr. Howard agreed to delay the inspection until after lunch.

11 XXXIV

12 The inspectors returned to the site at about 2:35 p.m. Mr. Howard was accompanied  
13 by Messrs. Krafft and Stoffel. Mr. Boller of EPA, did not attend this inspection. WCI was  
14 represented by Donn Herron, Mr. Nowell, Mr. Rekofke, Lee Howe and Catherine Herron.

15 XXXV

16 Ecology reviewed records. Mr. Howard asked Mr. Herron if had records of any  
17 inspections by the fire marshal, or other person familiar with the fire code, of the flammable  
18 storage area. He had no record and said no inspections had been conducted. WCI did have an  
19 inspection made in 1991, subsequent to the inspections. However, WCI failed to establish that  
20 it had held yearly inspections prior to 1991.

21 XXXVI

22 Mr. Howard asked Mr. Herron if WCI ever brought in wastes to the accumulation area  
23 directly from waste generators. Mr. Herron said, "No." Mr. Herron also responded  
24 affirmatively when Mr. Howard asked him if WCI always shipped waste from the  
25 accumulation area directly to other facilities. We find this testimony to be in conflict with the  
26

1  
2 testimony of the employees familiar with the daily handling of drums; the objective evidence  
3 including the limited space on site for drums; and the increasing number of drums appearing  
4 over time in the accumulation area, including the blue warehouse.

5  
6 XXXVII

7 Mr. Howard requested training records. What he was given did not list all the current  
8 employees by job description and type of training provided. The only employee, at that time  
9 who required training was Mr. Englehart. Ecology, in February, 1992, after the order and  
10 penalty were issued, received training records from WCI.

11  
12 XXXVIII

13 Mr. Herron provided a copy of a closure cost revision, dated: February 26, 1991. Mr.  
14 Howard asked for a copy of the 1990 closure cost estimate, but Mr. Herron said it was not  
15 available. Ecology received a part B permit modification application from WCI, on April 11,  
16 1990. That application contained a closure cost estimate for 1990; however it was in reference  
17 to an expanded facility, including tank storage, which was not part of WCI's current  
18 operation; and it covered property not covered by the current permit. That permit application  
19 was not signed by the owner of the property on which the present operation was occurring;  
20 and Ecology did not regard that estimate as valid for the permitted facility.

21  
22 XXXIX

23 Ecology later reviewed the 1991 closure cost estimate, and found several deficiencies.  
24 WCI, in response, sent Ecology a draft estimate, dated: December 5, 1991. WCI informed  
25 Ecology that it would send a final version of this estimate, when WCI had received the data it  
26 had requested from third parties, in regard to labor costs. Ecology regarded this as an  
27 improvement, because it increased the estimate from \$9283.03 to \$26,727.40. The final  
version, however, was never received by Ecology

1  
2 XL

3 WCI's annual report for 1990, form 4, showed two shipments of alkaline hot tank  
4 sludge, with a waste code of D002. WCI was listed as the generator. Mr. Howard asked Mr.  
5 Herron how WCI could generate such a waste stream. Mr. Herron replied that it was non-  
6 hazardous when they received it, but that they had treated it with lime until it became  
7 hazardous, and shipped it as such.

8 XLI

9 The inspectors found approximately 300 drums in storage in the blue warehouse. Some  
10 of them had been moved since the previous Friday. More drums had hazardous waste labels  
11 than on Friday, the drums were stacked more orderly, and the area was neater. The aisle  
12 space providing access to the east side was blocked with boxes and drums. Several aisles  
3 measured 24" or less in width. The visit concluded after 5:00 p.m.

14 XLII

15 WCI submitted its 1990 annual report to Ecology in March 1991. Ecology reviewed  
16 the annual report and rejected it in a letter dated August 23, 1991. Ecology requested that  
17 more than 86 pages of the annual report be corrected, by September 23, 1991. WCI  
18 responded, in a letter dated September 23, 1991, only addressing 84 of the pages. Ecology  
19 did not send to WCI any further requests for modification of the 1990 annual report.

20 XLIII

21 The final inspection was on October 1, 1991 EPA was the lead. The inspectors  
22 wanted to return to follow up on activities on the east side of the facility. They also wanted to  
23 get a better idea of the attitude of WCI towards access for inspections. Accordingly, EPA  
24 chose to get a federal warrant. Two federal marshals accompanied the inspectors to the site.  
25

1  
2 Ecology was represented by Messrs. Howard and Krafft; EPA by Mr. Boller and Sylvia  
3 Burges WCI was represented by Donn Herron. Lee Howe and Catherine Herron.

4 XLIV

5 WCI had about 90 drums and 96 five gallon pails, labeled hazardous waste, on the  
6 unpermitted east parcel. Mr. Herron stated that the drums contained blended fuels. Because  
7 the generators' labels were difficult to remove, Mr. Herron explained that the WCI labels  
8 would be placed on top of the existing labels. Ms. Burges peeled back several of the labels,  
9 which WCI had placed on top of the labels of the generators of the waste. Mr. Herron became  
10 agitated. He complained that WCI's property was being defaced, and pulled the hand of Ms.  
11 Burges away from a barrel as she was peeling off the label. The marshal intervened to warn  
12 Mr. Herron that if he touched any of the inspectors he would be arrested for assault. The  
13 inspection continued without incident.

14 XLV

15 The inspectors went briefly to the red barn, on Mr. Herron's property to the south of  
16 the site. The building was completely filled with over 100 drums. No hazardous waste labels  
17 were observed. Mr. Herron stated that all of the drums contained solid waste, not hazardous  
18 waste.

19 XLVI

20 Mr. Boller inspected the labels on four drums of blended fuels. He checked these  
21 against the manifests in WCI's possession, and its operating log. These drums contained  
22 several waste codes for which WCI had no permit to manage or store. The manifests indicated  
23 that these sample drums were representative of 34 drums which had been received by WCI. In  
24 addition, Mr. Boller observed 19 drums in the accumulation area which contained ,  
25  
26



1  
2 lead waste, which is not a permitted waste for WCI to manage. He observed one drum labeled  
3 as hazardous waste, which was not sealed. The accumulation start date on the label, listing  
4 WCI as the generator, was June 22, 1991. This drum was still in the accumulation area more  
5 than 90 days after this date.

#### 6 XLVII

7 Three other manifests showed that WCI generated and shipped off site 190 drums of  
8 hazardous waste containing lead or chromium, in July, August and September 1991. WCI's  
9 annual report for 1990 reveals that WCI managed wastes containing chloroform, cresylic acid  
10 and 1,2 dichloroethane, with waste codes: UO44, FOO4 and DO28, respectively. WCI is not  
11 permitted to manage or store such wastes.

#### 12 XLVIII

13 WCI, in September 1998, applied to the EPA, for a part A permit for an expanded  
14 facility. The application was not signed by Mr Stuchell, the owner of the property of the  
15 currently permitted facility. This application lists numerous waste codes which Ecology has no  
16 record of WCI handling prior to the submittal of this application. The application has not been  
17 approved by either Ecology or EPA. Ecology wrote to WCI, in a letter dated: August 28,  
18 1992, that it regarded the application as meaningless, because it was not signed by the owner;  
19 and because it gave no interim authority to WCI to manage waste codes with toxic  
20 characteristics.

#### 21 XLIX

22 The operating log utilized by WCI was designed for its original operation, which  
23 primarily involved solvent recovery. Once the product is recycled it is no longer a dangerous  
24 waste. Now that WCI is blending fuels, improperly storing ignitables and handling wastes for  
25 which it is not authorized, the operating log is no longer adequate. The purpose of the log is

1  
2 to allow tracking of the hazardous waste. Once the original generator is separated from that  
3 waste, as occurs in WCI's blending process, the liability for that waste would lie with all  
4 generators. For this reason it is especially critical to be able to trace these wastes, by content  
5 and by generator, as they are received, processed, and as they leave the site. Neither WCI's  
6 present log, nor the one they proposed to Ecology after the inspections would adequately fulfill  
7 this purpose.

#### 8 L

9 Ecology, on January 31, 1992, issued a civil penalty against WCI, in the amount of  
10 \$429,000, charging WCI with 21 violations of its permit and the dangerous waste regulations.  
11 Ecology concurrently issued an order to WCI, citing the same violations, and ordering WCI to  
12 take 14 specific actions to come into compliance with its permit and the regulations.

#### 13 LI

14 WCI filed with Ecology an application for relief from the penalty, on February 13,  
15 1992. Ecology responded by removing two of the violations, and reducing the penalty to  
16 \$367,000.

#### 17 LII

18 Any conclusion of law deemed a finding of fact is hereby adopted as such. From these  
19 findings of fact, the Board makes the following.

### 20 CONCLUSIONS OF LAW

#### 21 I

22 The Board has jurisdiction over these parties and the subject matter. RCW  
23 43.21B 300(1), .310(1), Chapter 70 105RCW  
24  
25  
26 ;

1  
2 II

3 Ecology has the initial burden of proof that the violations occurred, that the actions  
4 proscribed in the order are justified, and that the penalty is reasonable. WAC 371-08-183(3).  
5 The Board decides the matter de novo. WAC 371-08-183(2).

6 III

7 Ecology is the state agency designated to implement RCRA ( 42 USC, sec. 6901 et  
8 seq.) RCW 70 105 130(1)

9 IV

10 Under RCW 70.105.130(2)(e), Ecology has adopted regulations (Washington State  
11 Dangerous Waste Regulations, Chapter 173-303 WAC), which implement both the State  
12 Hazardous Waste Management Act, and the state's responsibilities under RCRA. These  
13 statutes and regulations, contain definitions of solid and dangerous waste; which definitions  
14 correspond to the definitions of solid and hazardous waste, respectively, contained in federal  
15 regulations adopted by EPA pursuant to RCRA

16 V

17 The wastes, for which WCI has the authority under its permit to manage and store,  
18 which comprise spent solvents (waste codes F001, F002, F003 and F005), constitute  
19 dangerous waste under the state regulations. WAC 173-303-082(1).

20 VI

21 We conclude that WCI has unlawfully expanded its facility by receiving and storing  
22 dangerous wastes on the eastern parcel of its facility. WCI is receiving more wastes than it  
23 has the capacity to handle under its permit. Until it receives a permit from Ecology for an  
24 expanded facility, its storage of wastes, including blended fuels, on the eastern parcel, is  
25 prohibited.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

## VII

The language of the permit is clear. It states: "[t]he permittee is allowed to store dangerous waste in accordance with the conditions of this permit. Any storage of dangerous waste not authorized in this permit is prohibited" Permit Condition A.1. The permit limits the storage of waste to the western portion of the property (parcels A and B). Only certain waste solvents are allowed to be stored, along with their residue (still bottoms). The facility is limited to a total of 360 55 gallon drums of such wastes.

## VIII

WCI is allowed, under the dangerous waste regulations, to accumulate these wastes, up to ninety days after the date they were generated, without a permit. WAC 173-303-200. WAC authorizes Ecology to require secondary containment of such accumulations, if Ecology determines that there is a potential threat the public health or the environment. WAC 173-303-200(1)(b). Ecology so found, in its order of January 16, 1990, where it required WCI to submit engineering plans for a secondary containment system for the accumulation area. Although plans were submitted, they have not been found sufficient by Ecology, considering the large quantities of waste involved. More importantly, there is a considerable quantity of waste being stored in this area, which does not qualify as accumulation of the wastes WCI generate under its permit. Specifically, this area is being utilized by WCI to increase its storage capacity, absent a permit; and to serve as a staging area for blended fuels, which WCI is not permitted to manage. We conclude that WCI is in violation of Permit Conditions A.1, A.12, A.13 and C.3.

## IX

WCI has also violated WAC 173-303-281, 282 and 830, governing the expansion of its facility. WCI has submitted to Ecology a Part B application to modify its permit; but there is

1  
2 no evidence to indicate that the application is for approval of the current operations in the  
3 accumulation area, including the blue warehouse. Moreover, the application submitted is not  
4 consistent with WAC 173-303-810(13)(ii), which requires a signed certification by the owner  
5 of the property, that it is aware of: the contents of the application, and of the owner's  
6 responsibility for complying with those provisions of the dangerous waste regulations with  
7 which only the owner can comply.

8 X

9 We further conclude that WCI is a marketer of blended fuels, which it generates, under  
10 WAC 173-303-510(5). Accordingly, it is subject to the regulations for notification and storage  
11 of such fuels

12 XI

13 WCI did deny access to Ecology and EPA inspectors. Both RCW 70.105.130 and the  
14 permit (Condition A 11) allow Ecology inspectors to enter at reasonable times to inspect the  
15 activities and records of the licensee. All of the inspections occurred during business hours;  
16 nevertheless, the inspectors were delayed and interfered with by the officials of WCI and their  
17 attorneys. The attorneys stated at the time of the inspections that the inspectors had no right to  
18 enter the premises without a warrant, or without permission. Neither of these are required  
19 under the law. Mr. Rekofke's statement that he did not have authority to grant access to the  
20 blue warehouse is not relevant, because the law does not require that the inspectors receive  
21 permission to inspect the site. Moreover, the statement is inconsistent with his previous  
22 actions, based on direction from Mr. Donn Herron, in instructing WCI employees not to  
23 answer questions; and by Mr. Herron's statements that indicate that he was relying on his  
24 attorneys to determine how WCI should respond to the investigation. His instructions to Mr  
25 Nowell, before the inspectors arrived on the first day, were, that if any inspectors arrived, in  
26

1  
2 Mr Herron's absence, to wait for an attorney to be present. When Mr. Howard spoke with  
3 Mr Herron on the phone the afternoon of July 18, Mr. Herron first asked that the inspectors  
4 wait until he or the attorneys were present. This attempt to deny access continued, even on the  
5 October 1, 1991 visit, when the inspectors came with a warrant and federal marshals. Mr.  
6 Herron's interfering with the EPA inspectors's removal of labels from hazardous waste drums,  
7 is an additional manifestation of his intent to control and limit the activities of the inspectors  
8 on the site. This interference in the inspectors activities, including their inability to enter the  
9 blue warehouse on Friday, July 19, constitute violations of the above-cited statute and Permit  
10 Condition.

## 11 XII

12 The evidence clearly establishes that the aisle space in the blue warehouse was blocked  
13 by drums and equipment in many instances, and was also less, in several areas, than the  
14 minimum distance required by Permit Conditions C 8 and Attachment 6, Container  
15 Management Provisions; and WAC 173-303-340(3) and 630(5)(c). The purpose of this  
16 provision is to provide adequate space at all times for managing drums, maneuvering  
17 equipment and controlling accidents. WCI violated the aisle space requirement.

## 18 XIII

19 WCI did not invoke the spill procedures contained in WAC 173-303-145(2) and  
20 Attachment 4 to its permit. The spill of oil, from the drum in the accumulation area, turned  
21 out to be hazardous waste. It was WCI's obligation to sample the contents of the drum,  
22 immediately after the spill occurred. The spill was observed by the inspectors on the first day.  
23 It was the inspectors who sampled this material on the second day of the site inspection, after  
24 WCI refused to take any samples. This represents a disregard for the regulations, the permit,  
25 and the safety of the workers at the facility

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

#### XIV

Many drums lacked proper identification. In numerous instances, the drums were turned such that the labels could not be read. In others, there were no labels, or the labels were unreadable. Permit Condition C.6 references the requirement of WAC 173-303-630(3), which requires that:

*[t]he owner or operator must label containers in a manner which adequately identifies the major risk(s) associated with the contents of the containers for employees, emergency response personnel and the public . . . The owner or operator must ensure that labels are not obscured, removed, or otherwise unreadable in the course of inspection required under WAC 173-303-320.*

WCI argues that this requirement only applies when WCI runs an inspection. This reading would defeat the purpose of the requirement, which is to alert the employees, emergency response personnel and the public to potential risks associated with the contents of the drums. We note that WCI did not have available an inspection log, at the time of Ecology's inspections, which registered any inspections of flammable wastes in its possession. We read the regulation's reference to WCI's inspections as an additional requirement, which does not obviate the requirement of having all drums of dangerous wastes clearly labeled as to the contents, at all times. WCI violated WAC 173-303-630(3) and Permit Condition C.6, by failing to ensure that all drums, on both the western and eastern portions of the site, containing dangerous waste were properly labeled.

#### XV

WAC 173-303-630(5)(a), which is referenced in Permit Condition C.8, mandates that: "[a] container holding dangerous waste must always be closed, except when it is necessary to add or remove waste" Ecology interprets that as meaning secured against potential evaporation, or spills, if inside, and against precipitation, if outside. Given the nature of risk

1  
2 inherent in dangerous wastes, we believe that interpretation is reasonable. This interpretation  
3 is consistent with Attachment 6 (Container Management Practices) of the permit, which states  
4 that the condition of the containers is to be inspected weekly, for "leaks, tight bungs and  
5 corrosion". We therefore conclude that WCI violated the regulation and the permit in not  
6 securing the bolts on all the drums, on both sides of the site.

## 7 XVI

8 Conclusion of Law VII cites Permit Condition A 1, which limits WCI's management of  
9 wastes to those dangerous wastes identified in the permit. Condition C.1, specifies the  
10 solvents which WCI is authorized to store. The Waste Analysis Plan (Attachment 1) identifies  
11 more specifically the wastes that WCI is authorized to receive at its site. WCI has been  
12 storing dangerous wastes that are not authorized in its permit. It has been blending fuels that it  
13 is not authorized to manage under its permit. WCI has been managing wastes, including:  
14 lead, chromium, 1,2 dichloroethane, cresylic acid, and chloroform, for which it lacks  
15 authority to handle. This is evidenced by the drum sampling and records of WCI. WCI has  
16 violated its permit. Its contention that it is authorized to manage these wastes because it  
17 submitted a part A application, is not valid. A part A application is not a proper mechanism  
18 for amending a part B permit. Part A applications allow facilities that have been handling  
19 wastes that subsequently become subject to regulation, to be "grandfathered". WCI presented  
20 no evidence that it handled the wastes included in its September 1990 application, prior to  
21 submission of that application. In any event, no permit application has been approved by  
22 Ecology which would authorize the management of such wastes; therefore, their management  
23 and storage constitutes a violation of the existing permit.



1  
2 **XVII**

3 WAC 173-303-070(3), requires that the facility accurately designate its wastes. The  
4 purpose of this is obvious. It is to protect the employees and third parties from risk. WCI  
5 failed to do this. Four of the six drums labeled on July 19, for example failed to identify  
6 dangerous waste characteristics which were ultimately found in the drum. All of these drums,  
7 in fact were labeled non-hazardous. One of them was flammable, and contained no label  
8 warning of that fact. WCI argues that the test results are invalid for two reasons: first, the  
9 testing was accomplished more than 14 days after the sample was taken; and second, because a  
10 "chain of custody" was not established.

11 **XVIII**

12 WCI's objections are not well-founded. The 14 day period, refers to the holding time  
13 recommended for the testing for toxic characteristics leaching period ("TCLP"). It has no  
14 relevance to the other dangerous waste tests, which determined whether the samples had the  
15 normal dangerous waste characteristics. Moreover, as exhibit 5 clearly states, if the holding  
16 period is exceeded, the identified concentrations of toxic substances, are "minimal  
17 concentrations". The testimony explained that this is because the concentrations dissipate over  
18 time.

19 **XIX**

20 The question of whether a chain of custody must be shown is a matter of degree only.  
21 The court has considerable discretion in administering the rule, in light of the evidence and  
22 circumstances of the case. 5 K. Tegland, Washington Practice 281-82 (3d ed. 1989); Ballou  
23 v. Henri Studios, Inc., 656 F.2d 1147 (5th Cir. 1981). Minor discrepancy, or uncertainty on  
24 the part of the witness will affect only the weight of the evidence, not its admissibility. State  
25 v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984), cert. denied 471 U.S. 1094, 105 S.Ct.

1  
2 2169, 85 L.Ed.2d 526 (1985). The obvious purpose of the rule is to minimize the likelihood  
3 of meddlers tampering with the evidence. See Campbell, at 103 Wn.2d 21 (holding that the  
4 officers handling the evidence adequately preserved it such the chance of tampering was  
5 unlikely). We are satisfied that Ecology adequately established the integrity of the sample  
6 results. Wayne Krafft, who managed the samples, has a degree in chemistry, and has had  
7 considerable experience sampling and testing the results, both in the private sector, and with  
8 Ecology's Manchester laboratory. He undertook extreme caution in protecting the samples  
9 from the time he took them to the time he sent them to Manchester laboratory. He testified  
10 that Manchester had signed the chain of custody form, upon its receipt of the samples,  
11 declaring that the samples were intact. He was familiar with Manchester's handling of  
12 samples, and its custom of contracting out sampling in special cases. He produced the chain of  
13 custody forms showing that these laboratories received the samples directly from the  
14 Manchester laboratory. WCI did not provide any evidence that suggests that these samples  
15 were tampered with. Even though WCI received duplicate samples from Ecology, it offered  
16 no evidence to the effect that the samples were inaccurate. We conclude therefore, that the  
17 samples are valid, and that WCI violated WAC 173-303-070(3), by not accurately labelling its  
18 dangerous wastes.

19 XX

20 Ecology charged WCI with violating WAC 173-303-395(4), which requires that  
21 loading areas be designed to contain spills of dangerous wastes. The area allegedly in  
22 violation is a dirt space between parcels A and B on the west side. Mr. Howard testified that  
23 he observed trucks and drums in this area on various occasions. Although he did not identify  
24 the drums as containing dangerous wastes, we are persuaded; in light of the evidence that  
25 shows that WCI is not accurately designating waste labeled as non-hazardous; the fact that  
26

1  
2 there is no evidence that WCI is handling non-hazardous wastes on the permitted parcel; and  
3 the evidence establishing that WCI is moving drums between the west and east sides, which  
4 are separated by a fence, that WCI is more likely than not violating this provision of the  
5 regulations.

## 6 XXI

7 The permit requires that ignitable waste drums be stored outside and 50 feet from the  
8 building, in accordance with the Uniform Fire Code. Attachment 7. Permit Condition C.11  
9 and WAC 173-303-630(8) also require storage of such wastes in conformity with the Uniform  
10 Fire Code. The outdoor storage requirement is repeated again in Attachment 6. WCI violated  
11 this requirement in regards to several drums labeled flammable in the storage warehouse.  
12 Samples 3 and 4, which were of drums containing flammable waste, and were also stored  
13 inside the warehouse on parcel B. One of these drums was labeled "flammable," the other was  
14 not. There was no evidence that WCI was testing, or planning to test these drums at the time  
15 of the inspection. WCI's contention, in its brief that there was no evidence that WCI did not  
16 move the drum outside at the end of the day, misunderstands that the burden of proof shifted  
17 to WCI to prove this assertion, once Ecology established that the ignitable drums were stored  
18 indoors.

## 19 XXII

20 WAC 173-303-330(2) requires the facility to prepare a written training plan, which  
21 must be kept on the premises. The plan must contain, by position and name of the employee:  
22 a description of the skills, education and other qualifications, and the duties; as well as the job  
23 training required for each employee. WAC 173-303-330(2)(a) and (b). Finally, the plan must  
24 contain documentation that the job training requirements have been fulfilled for each position.  
25 These requirements are also referred to in the permit. The training records must be kept until  
26

1  
2 the closure of the facility. WAC 173-303-330(3). The permit requires that new employees  
3 complete training within six months of assignment to waste management duties, or of their  
4 employment. Attachment 2.

### 5 XXIII

6 WCI did not produce any of these records when Ecology requested them during the  
7 inspections. WCI later produced evidence that only one of its employees, Mr. Englehart, had  
8 been with the company less than six months, at the time of the inspections. The training  
9 records were not available at the time of the inspection. We read the regulation as requiring  
10 that these records be kept current and on site, so that not only the facility, but third parties,  
11 including the regulatory agencies, can be assured that the employees who handle dangerous  
12 waste are properly trained. This is made manifest in WAC 173-303-380(3)(a), which  
3 mandates that:

14 *All facility records, including plans required by this chapter must*  
15 *be furnished upon request, and made available at all reasonable*  
16 *times for inspection, by any officer, employee, or representative*  
*of the department who is designated by the director.*

17 Permit Condition A.22.b also requires that these training records be kept at the facility, until  
18 its closure. Consequently, we conclude that WCI did violate the cited permit conditions and  
19 regulation.

### 20 XXIV

21 Permit Condition B.11 and WAC 173-303-380 require WCI to keep an operating log at  
22 the facility. The purpose of this requirement is to enable the facility, third parties and  
23 regulators to be able to readily track the drums of dangerous waste in a facility. Every drum  
24 should be traceable at any time in the process. WCI's operating log is inadequate for this  
25 purpose. The data it provides was not intended to, and does not track the blended fuels that  
3

1  
2 WCI is generating and marketing. We conclude that although Ecology has dropped this  
3 violation as a basis of the civil penalty, it stands as a basis for the regulatory order.

4 XXV

5 WCI is under an obligation to have an annual inspection of those areas where ignitable  
6 waste are stored, in the presence of a professional person familiar with the Uniform Fire Code,  
7 or in the presence of a fire marshal. Permit Condition B.7 and WAC 173-303-395(1)(d). In  
8 addition, the facility must keep a record of such inspection in its inspection or operating log.  
9 Id. Such records must be kept on site for at least five years. WAC 173-303-320(2)(d). It  
10 must be made available to Ecology inspectors, at the time of inspection. WAC 173-303-  
11 380(3)(a); Permit Condition C.11. These records are important to monitor the safety of  
12 dangerous waste operations, where flammable wastes are concerned. WCI violated the permit  
13 and regulatory requirements regarding such inspections.

14 XXVI

15 Permit Condition B.3 and Attachment 1 require WCI to test regularly representative  
16 dangerous waste drums with a Coliwasa sampler. WCI did not have a Coliwasa sampler on  
17 the site, at the time of the inspections. It had broken one about a month earlier. Neither did  
18 WCI have a glass tube for sampling at that time. Indeed, WCI, after being asked by the  
19 inspectors to take the samples on July 19, told Ecology to take their own samples. WCI's.  
20 WCI's lack of sampling equipment on site is a violation of its permit, and it reveals a serious  
21 disregard for the minimum regulatory requirements. It may help explain why WCI had  
22 dangerous wastes that were not labeled or were improperly designated.

1  
2 **XXVII**

3 WAC 173-303-380(1) requires that the facility keep on the premises a written operating  
4 record of the facility's operations, until its closure. This record must include all closure cost  
5 estimates. WAC 173-303-380(1)(g). The regulations require that these estimates be updated  
6 annually. WAC 173-303-620(3)(c). These records must be made available to Ecology  
7 inspectors upon request. WAC 173-303-380(3)(a). WCI produced a closure cost estimate  
8 dated: February 26, 1991. Ecology asked WCI for a copy of its 1990 closure cost estimate,  
9 but was told that it was not available. The regulation requires that all closure cost estimates be  
10 retained at the site. Permit Condition B.13.c states that the permittee must keep at the facility,  
11 the latest cost closure estimate, as required by WAC 173-303-620(3)(a). Reading this  
12 condition alone, there would be no requirement to retain prior cost closure estimates. The  
13 permit, however, must be read as a whole. Condition B.11.a and .b require, however that the  
14 permittee maintain and retain in the facility, the written operating log record called for in  
15 WAC 173-303-380; and all dangerous waste management records referred to in WAC 173-  
16 303-380(3). WAC 173-303-380(1)(g), requires the operator to maintain in the operating  
17 record of the facility, until closure, all cost closure estimates required for the facility. WAC  
18 173-303-380(3)(a), requires all these records to be made available to the inspector upon  
19 request. As we noted earlier, the facility must update its cost closure estimate annually. WAC  
20 173-303-620(3)(c). Therefore, reading the permit in its entirety, all cost closure estimates  
21 must be retained, and available for inspection at the facility, until it closes. We conclude that  
22 WCI violated this requirement of the permit and the regulations.

23 **XXVIII**

24 The cost closure estimate is the estimate of ensuring safe closure of the facility. The  
25 cost is measured at the time in the life of the facility when such closure would be most

1  
2 expensive, as indicated by the facility's closure plan. WAC 173-303-620(3)(a)(i). In  
3 addition, the permittee must base the cost on having the closure done by an independent third  
4 party. WAC 173-303-620(3)(a)(ii). The estimate must be updated annually for inflation.  
5 WAC 173-303-620(3)(c) The plan must describe the methods planned for disposal of the  
6 dangerous waste, and decontamination of all residues, equipment and soils. WAC 173-303-  
7 610(3)(a)(iv) and (v). The cost closure plan may only be accomplished by an amendment to  
8 the operating permit. Permit Condition B.12.b; WAC 173-303-610(3)(b). The purpose of the  
9 cost closure estimate is to protect the public against abandonment of the facility.

#### 10 XXIX

11 Ecology, in a letter dated: November 20, 1991, found WCI's February 26, 1991 cost  
12 closure estimate to be inadequate. The document estimated a closure cost of \$9283.03. It was  
13 based on disposal of 80 drums; whereas the permit provides for storage of a total of 360 55  
14 gallon drums. Ecology questioned whether all closure costs were based on the assumption that  
15 the work would be done by third parties. The estimate failed to identify the specific disposal  
16 site, and the costs of disposal at that site. Ecology stated that all materials must be disposed of  
17 as dangerous waste, no credit or cost savings could be assumed for recyclable materials. The  
18 letter also called for greater detail in describing the transportation costs.

#### 19 XXX

20 WCI responded with a revised, "preliminary draft" cost closure estimate. The revised  
21 cost estimate was \$26,727 40. WCI stated that the final revision would be submitted when it  
22 had received the data it had requested from third parties. Although Ecology admitted that the  
23 revision was an improvement. Ecology never received a final version. WCI argues that  
24 Ecology's failure to respond to its part B application means that Ecology has approved the cost  
25 closure estimate submitted with that application. We disagree. There is nothing in the

1  
2 statutes. nor in the regulations which makes a failure of Ecology to respond an acceptance of a  
3 submittal. The 60 day response required by Ecology in WAC 173-303-840(1)(b) may entitle  
4 WCI to seek a writ of mandamus requiring Ecology to act on its application. It does not,  
5 however, entitle WCI to an approval, nor does it entitle Ecology to consider such application  
6 denied. WCI's 1991 cost closure estimate was inadequate. It did not satisfy the requirements  
7 of Permit Condition B.13.a, or those of WAC 173-303-620(3)(b) and (c).

### 8 XXXI

9 WCI's permit requires it to report all instances of noncompliance within 15 days of the  
10 time it becomes aware of the circumstances. Permit Condition B.18. The purpose of this  
11 requirement is to assist the regulatory agencies monitor compliance of the facility. WCI  
12 violated this condition by failing to report each of the instances of noncompliance for which it  
13 was cited.

### 14 XXXII

15 Permit Condition B.11.c and WAC 173-303-390 describe the annual report  
16 requirements for WCI. The regulation requires that the permittee submit the annual report to  
17 Ecology by March 1 of each year. WAC 173-303-390(2). WCI submitted the 1990 annual  
18 report in March 1991. Ecology returned to WCI its 1990 annual report (form 5) because of  
19 numerous deficiencies in describing the dangerous wastes received by the facility. Form 5  
20 documents the type of waste, by generator, received by WCI, throughout the year. WCI  
21 substantially responded to the request for corrections. Nevertheless, it did not substantially  
22 conform to the requirement of filing an accurate annual report by March. The form it filed  
23 necessitated changes in designations of wastes from dangerous to extra hazardous, and resulted  
24 in major changes on over 80 pages of the annual report. Thus, we conclude that WCI violated  
25 the annual reporting requirement for the year 1990.



1  
2 XXXIII

3 The above violations support the regulatory order issued by Ecology. We note that  
4 WCI has been managing substantial solid wastes. Although this management is not subject  
5 directly to the regulatory authority of Ecology, Ecology does exercise authority over local  
6 solid waste management plans. RCW 70.95.094 Ecology also has the authority to  
7 promulgate regulations containing the minimum standards for solid waste handling. RCW  
8 70.95.060. Local health jurisdictions have the primary regulatory authority over solid waste.  
9 WAC 173-304-410 contains the substantive standards for facilities that receive solid waste  
10 from off-site. Although we find no requirement in the statute or regulations which require  
11 such facilities to obtain a permit from the local health jurisdiction, we conclude that these local  
12 authorities have the authority to regulate the solid waste operations of WCI. Nevertheless, we  
13 can find no authority for Ecology to issue regulatory orders governing the management of  
14 solid waste. Its power in this area is limited to that of persuasion, and to ~~contacting~~ advising  
15 the local health jurisdiction of the results of its investigations. Ecology was without authority  
16 to make ~~to~~ the command contained in paragraph six of the regulatory order.

17 XXXIV

18 The Board generally considers three factors in reviewing the appropriateness of a civil  
19 penalty. These are: 1) the nature of the violations, 2) the prior behavior of the violator, and 3)  
20 actions taken after the violation to solve the problems.

21 XXXV

22 The violations in this case are symptomatic of a facility which does not have the  
23 capacity at its site to handle the wastes it is receiving. Equally important, it is obvious that  
24 WCI has expanded from being a simple recycler of spent solvents, to being also a generator  
25 and marketer of blended fuels. The wastes it is now managing include many substances for  
26

1  
2 which WCI has not authority to store or manage. Some of these substances, such as lead, pose  
3 risks not contemplated in the permit. The increasing volume of wastes received by WCI has  
4 resulted in improper storage in a facility which is not licensed. For whatever reason, WCI is  
5 not complying with the requirements of the regulations and of its permit regarding the  
6 designation, labeling and safe storage of wastes. Its record keeping is not only inaccurate, it  
7 has been deceptive. WCI has not been straight forward with the regulatory agencies about the  
8 true scope and risks associated with its operations. It has revealed the true information only  
9 after the agency initiated enforcement actions. We conclude that the violations are substantial.

#### 10 XXXVI

11 Ecology commenced its first enforcement action against WCI in 1982, when it issued  
12 WCI \$1000 civil permit for storing hazardous waste without a permit. Since then, WCI has  
13 shown a pattern of minimal compliance with the dangerous waste laws and regulations. The  
14 purpose of civil penalties is to protect the public interest by reforming the behavior of the  
15 violator. WCI has not received the message. Its attitude towards the inspectors, challenging  
16 them on numerous occasions, even when EPA resorted to obtaining a search warrant, typifies  
17 its recalcitrance.

#### 18 XXXVII

19 After the investigation, WCI submitted, in response to Ecology's request, an amended  
20 1990 annual report, which more accurately described the nature of the wastes received by it  
21 that year. After Ecology issued the civil penalty and order, WCI submitted records in regard  
22 to the training of its employees. WCI also submitted evidence of a post inspection fire safety  
23 inspection. It also submitted information pertaining to WCI's operating record which caused  
24 Ecology to reduce the civil penalty pertaining to the inadequacy of WCI's operating record.  
25 Ecology also reduced the civil penalty, upon WCI's request, based upon deletion of the alleged

1  
2 improper designation of dangerous wastes on the east side of the property. We view these  
3 efforts as some progress towards compliance with the applicable permit and regulatory  
4 requirements. However, WCI has failed to submit a valid application to modify its part B  
5 permit, to cover the operations it is currently engaged in. If it cannot get the owner's  
6 signature, it should consider moving its entire operation to a new site, where it can clearly  
7 conform to all the dangerous waste requirements.

8 XXXVIII

9 We are mindful that the Legislature has concluded that:

10 *Strong and effective enforcement of federal and state hazardous*  
11 *waste laws and regulations is essential to protect the public*  
12 *health and the environment and to meet the public's concerns*  
*regarding the acceptance of the needed new hazardous waste*  
*management facilities.*

3 RCW 70.105.005(4) The statute allows civil penalties to be assessed in the amount of up to  
14 \$10,000 per violation, per day. RCW 70.105.080. A violation involving one drum, for one  
15 day, could potentially lead to a penalty of \$10,000. Here WCI committed 19 violations  
16 involving numerous drums for numerous days. Many of the violations, including those of  
17 storing and managing wastes without a permit, continue to this day. Under all the  
18 circumstances, we conclude that the reduced penalty of \$367,000 is reasonable.

19 XXXIX

20 Any finding of fact deemed to be a conclusion of law is hereby adopted as such. From  
21 the foregoing, the Board issues this.

1  
2 **ORDER**

3 1) Ecology Order No. DE 92HS-E901, requiring WCI to take certain actions  
4 regarding the storage and management of dangerous wastes, with the exception of paragraph  
5 six, is affirmed.

6 2) Ecology Notice of Disposition From Application for Relief From Penalty No.  
7 DE 92 HS-E902, mitigating the civil penalty from \$429,000 to \$367,000, is affirmed.

8 DONE this 16<sup>th</sup> day of March, 1994

9  
10 **POLLUTION CONTROL HEARINGS BOARD**

11   
12 ROBERT V. JENSEN, Presiding Officer

13   
14 RICHARD C. KELLEY, Member

15 P92-41F  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26